IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. J.A.S., DOB: 07/17/1993 Appellant.	)))))))))))	No. 63512-3-I DIVISION ONE UNPUBLISHED OPINION FILED: May 3, 2010

SPEARMAN, J.—J.A.S. appeals his juvenile adjudication of rape in the second degree, arguing the trial court erred by (1) depriving him of his right to present a defense, (2) declining to hold a separate CrR 3.5 hearing, and (3) failing to enter CrR 3.5 findings and conclusions. We reject his arguments and affirm.

FACTS

J.A.S. and A.W. went to a park, where they began engaging in sexual intercourse. A.W. began having second thoughts, at which point J.A.S. flipped A.W. onto her stomach, forcefully pulled her pants down, bent her over a log, and pinned her down by the shoulders while he penetrated her anus with his

penis. A.W. repeatedly told J.A.S. to stop. She tried to resist physically, and managed to kick J.A.S., but he did not stop. J.A.S. then flipped A.W. onto her back and penetrated her vagina with his penis. She again told him to stop, but he did so only when he noticed she was bleeding.

The Lynnwood Police asked J.A.S. and his parents to come to the police station and discuss the incident. J.A.S. gave a written statement claiming the two had engaged only in consensual oral sex. The State charged J.A.S. with second degree rape. At trial, the State offered J.A.S.'s written statement into evidence, and defense counsel did not object. The trial court did not enter written CrR 3.5 findings and conclusions.

The court found A.W.'s testimony credible, and adjudicated J.A.S. guilty of second degree rape. J.A.S. appeals.

DISCUSSION

Right to Present a Defense

During trial, defense counsel sought to cross-examine A.W. about her alleged history of self-cutting behavior, purportedly to show that A.W. had injured herself and fabricated the claim of rape. The State objected, and the trial court sustained the objection. J.A.S. contends this ruling violated his right to present a defense. We disagree.

A defendant's right to compel the attendance of witnesses under the Sixth Amendment and the Washington State Constitution necessarily includes the

right to present a defense. State v. Maupin, 128 Wn.2d 918, 913 P.3d 808 (1996); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). A defendant, however, has no right to present evidence that is not relevant, is speculative, or is otherwise inadmissible. Rehak, 67 Wn. App. at 162; State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006). We review a trial court's decision to exclude evidence for an abuse of discretion. State v. Lord, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007).

Here, the trial court concluded that defense counsel lacked foundation for the line of questioning about A.W.'s past self-cutting, and that any such behavior was irrelevant:

> Q: Do you know what SI stands for?
> A: Self injury.
> Q: Okay. And you've done that to yourself?
> A: Yes.
> MR. ADCOCK: Objection. Relevance, Judge.
> A: Yes.
> MR. ADCOCK: I don't see how that's indicative of her credibility or what happened here. There's no link.
> MR. MOLL: I'll move on, Your Honor.
> THE COURT: The objection will be sustained.
> Q: (By Mr. Moll) Why do you cut yourself?
> MR. ADCOCK: Objection. Same basis.
> THE COURT: What's the relevance?
> MR. MOLL: Your Honor, the theory of the case is the – that [A.W.} was seeking attention. She was angry. This is an attention seeking behavior and that is why it's relevant to this case.
> MR. ADCOCK: My response to that is there's no foundation for that. There's been no testimony that this kind of behavior is attention seeking. It's not relevant, and I think he's trying to intimidate the victim.
> THE COURT: The objection will be sustained.

Verbatim Report of Proceedings (April 14, 2009) at 61-62.

The trial court properly sustained the objections. Defense counsel's line of questioning about A.W.'s past self-cutting bore no relevance to the defense theory that A.W. fabricated the rape. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence. ER 401. Here, to the extent A.W. engaged in self-cutting in the past, it does not shed any light on the question of whether A.W. fabricated the rape, nor is it probative of her credibility. Such a connection is nothing more than speculation, and is not admissible. Mee Hui Kim, 134 Wn. App. at 41.

CrR 3.5 Hearing

J.A.S. next argues the trial court erred by not holding a separate CrR 3.5 hearing regarding the admissibility of his statements to police. We disagree. Under CrR 3.5(a), the trial court "shall" hold a hearing "[w]hen a statement of the accused is to be offered in evidence." There is no requirement, however, that the hearing be separate from the trial in a juvenile adjudication. Indeed, this court has held that where a case is tried to the bench, it is not error for the trial court to deny the accused's request for a separate CrR 3.5 hearing. State v. Wolfer, 39 Wn. App. 287, 292, 693 P.2d 154 (1984), abrogated on other grounds by State v. Heritage, 152 Wn.2d 210, 95 P.3d 345 (2004). We agreed with the majority of courts that have examined the issue, holding that "there is no

need for a separate voluntariness hearing in the case of a bench trial," and that "a judge is presumed to rely only upon admissible evidence in reaching a decision." Wolfer, 39 Wn. App. at 292.

J.A.S. nevertheless contends the lack of a separate CrR 3.5 hearing requires reversal of his conviction. He relies largely on our decision in State v. Tim S., 41 Wn. App. 60, 701 P.2d 1120 (1985). In Tim S., however, the trial court made its decision to admit the statement based only on the officer's version of the facts, and the statement was admitted "for impeachment purposes" without permitting the defendant the opportunity to present other evidence. Tim S., 41 Wn. App. at 62-63. As such, we held that "[t]he record before this court raises a serious question as to whether the statement was voluntarily made and thus admissible for impeachment purposes." Tim S., 41 Wn. App. at 63.

Here, by contrast, the question of whether J.A.S.' statements were voluntary was fully explored when the police officer who took the statements testified during the bench trial:

Q: Sir, what's your occupation?
A: I'm a detective with Lynnwood Police.
. . .
Q: And did you have any involvement with this case?
A: Yes, I did.
. . .
Q: . . . [D]id you have contact with the respondent?
A: Yes, I did.
Q: And where did that contact take place?
A: At Lynnwood Police.
Q: Did he come in and speak with you?

A: Yes, he did.
Q: I'm going to show you what's been marked as State's Exhibit for identification No. 1 and ask you if you can identify this.
A: That's Lynnwood Police Department's constitutional rights form.
Q: Did you read that to the respondent?
A: Yes, I did.
Q: And can you read to the Judge everything you read to the respondent that day?
A: I, [J.A.S.], have been advised that I have the right to remain silent. Anything I say can be used against me in a Court of law. I have the right at this time to talk to a lawyer and have him present with me while I'm being questioned. If I cannot afford to hire a lawyer, one will be appointed to represent me before questioning if I wish. I can decide at anytime to exercise these rights and not answer any questions or make any statements.

[J.A.S.] is under 18 so I read him the Number 6 there. That if I'm under age 18 anything I say can be used against me in a Juvenile Court prosecution for juvenile offense and can also be used against me in an adult court criminal prosecution if I am to be tried as an adult.
Q: Did you ask him if he understood those rights?
A: Yes.
Q: What did he respond?
A: He said he understood.
Q: Did he express any confusion about his rights?
A: No.
Q: Did he ask you to reread anything?
A: No.
Q: Did you ask him whether he was willing to speak to you after that - - having his rights in mind?
A: Yes.
Q: How did he respond to that?
A: He agreed to speak with me.
Q: Did he have any confusion about that?
A: No. I - - his parents were there as well, and I asked both of them and they had no confu – no confusion either.

Verbatim Report of Proceedings (April 14, 2009) at 70-72.

After this exchange, the officer testified as to J.A.S.' statements, including

J.A.S.' written statement. Defense counsel then engaged in a thorough cross-examination on the issue of whether J.A.S.' statements were voluntary, and offered no objection when the State moved to admit J.A.S.' written statement:

> BY MR. MOLL:
> Q: He and his parents voluntarily came down to the - - the Lynnwood Police Department?
> A: Yes.
> Q: Is that where they ended up? And had you called them before hand to tell them to come down?
> A: Yes, I did.
> Q: And did you tell them why they were - - the family was coming down?
> A: I believe so. And they may have already known why.
> Q: Right. And you indicated on direct that you wrote - - I'm sorry - - that you read [J.A.S.] his rights?
> A: Yes.
> Q: Correct? Okay. And did you explain to him - - you indicated on direct that he wrote - - he only wrote one statement; is that correct?
> A: Correct.
> . . .
> Q: And did you explain to [J.A.S.] that this was written under the penalty of [perjury]?
> A: Well, he signed it underneath that it's under penalty of [perjury].
> Q: And you indicated to him that this would be his final statement?
> A: No. I didn't indicate that it would be a final statement. The investigation wasn't over at that time.
> Q: Did you indicate to him that this written statement could be used in Court?
> A: I let him know and his parents know that this would more than likely be sent up to the Prosecutor's Office, so I didn't - - I might not have used those specific terms that it could be used in Court, but I did tell them that it would go to the Prosecutor's Office.
> Q: Okay. And was your feeling that he understood what he was - - the statement he was giving and why he was giving it?
> A: Oh, yeah.
> Q: Okay.
> MR. MOLL: Nothing further.

MR. ADCOCK: I have nothing further. I would offer State's Exhibit 1.
THE COURT: Any objection?
MR. MOLL: No objection.
THE COURT: One will be admitted.

Verbatim Report of Proceedings (April 14, 2009) at 73-75.

In short, the question of whether J.A.S.' statements were voluntary was fully explored, and the trial court did not err by failing to hold a CrR 3.5 hearing separate from the bench trial. Wolfer, 39 Wn. App. at 292. Moreover, we note that J.A.S. waived any objection to the admission of his statements by failing to object to their admission at trial. State v. Spearman, 59 Wn. App. 323, 325, 796 P.2d 727 (1990).

CrR 3.5 Findings

J.A.S. next argues the lack of CrR 3.5 findings and conclusions as to the voluntariness of his statements requires reversal. J.A.S. is correct that CrR 3.5 requires the trial court to enter written findings and conclusions:

> (c) **Duty of Court to Make a Record**. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

J.A.S. failed to raise this issue at trial, however. As such, we will not consider the issue on appeal, unless J.A.S. can demonstrate the lack of findings constitutes "a 'manifest error affecting a constitutional right'." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (quoting RAP 2.5(a)(3)).

J.A.S. cannot make the requisite showing. Our Supreme Court has already addressed a similar issue in State v. Williams, 137 Wn.2d 746, 975 P.2d 963 (1999). In that case, the defendant argued the court's failure to give the defendant the warnings required by CrR 3.5(b)[1] was a manifest error. Williams, 137 Wn.2d at 749-50. The Supreme Court disagreed, noting that the rule is "intended to ward against the admission of involuntary, incriminating statements." Williams, 137 Wn.2d at 751. For this reason, the Court held that remand was "unnecessary where there was no question of the confession's voluntariness." Williams, 137 Wn.2d at 751. The Supreme Court went on to quote from the Court of Appeals dissent, which argued that actual voluntariness should be the focus of the inquiry:

> The real question before us is whether [the defendant's] substantive constitutional right was violated, not whether the exact procedure niceties directed under CrR 3.5(b) have been followed. To follow a contrary rule of precedence elevates form over substance. The procedure is not the end to be achieved, but merely an additional means for assuring substantive due process.

Williams, 137 Wn.2d at 754 (quoting State v. Williams, 91 Wn. App. 344, 351, 955 P.2d 865 (1998) (Brown, J., dissenting)).

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[1] Under CrR 3.5(b), a trial judge is required to inform a defendant that:

> (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

The Supreme Court then noted that the defendant was afforded an opportunity to testify, that he testified consistently with the exculpatory portions of his statements, and that he disputed almost nothing in the admitted statements. Williams, 137 Wn.2d at 755. Given there was there was "no question of the confession's voluntariness," Williams, 137 Wn.2d at 751, the Court held "the trial court's failure to give the CrR 3.5(b) advice of rights is not a constitutional error, let alone one that resulted in any actual prejudice." Williams, 137 Wn.2d at 755.

Here, as in Williams, there was no constitutional error. As is described above, the question of whether J.A.S.' statements were voluntary was fully explored. There is no dispute that J.A.S. came to the police station voluntarily. His parents came with him and were present during police questioning. He signed the statement of his own free will. Additionally, J.A.S. had the opportunity to testify, counsel engaged in extensive cross-examination of the police officer, and counsel did not oppose admission of J.A.S.' written statement. Indeed, the defense theory of the case was that consensual sexual activity took place, a theory consistent with J.A.S.' written statement.

In sum, the trial court's failure to enter written findings and conclusions under CrR 3.5(c) was not a constitutional error, and J.A.S. has suffered no actual prejudice. Williams, 137 Wn.2d at 755.

Affirmed.

Spearman, J.

WE CONCUR:

Appelwick, J.

Ellington, J.